BANK KERJASAMA RAKYAT (M) BHD v. KOPERASI SERBAGUNA IMAN MALAYSIA BHD; MAYBANK ISLAMIC BHD & ORS (GARNISHEES)

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA J
[SUIT NO: WA-22M-127-03-2019]
(APPLIC FOR EXECUTION NO: WA-37G-12-02-2020)
3 JANUARY 2023

Abstract – *The judgment creditor, who seeks the court to order the judgment debtor to transfer the monies that it had allegedly 'siphoned' into another account back to its respective accounts in order to enable the judgment creditor to garnish the same, has no legal basis for praying for such retransfer order pursuant to the court's inherent powers under O. 92 r. 4 of the Rules of Court 2012. Once the court has declined to grant an order absolute, the monies in the judgment debtor's accounts are unfrozen and the judgment debtor would be able to access and use the funds. The judgment creditor's application for the retransfer order, the judgment creditor having omitted to apply for a stay, is a form of abuse.*

CIVIL PROCEDURE: *Proceedings – Garnishee – Application to garnish funds taken out by judgment debtor – Whether judgment creditor had legal basis in seeking retransfer order – Effect of granting of order absolute being declined earlier by Senior Assistant Registrar – Whether court lifted freezing order and judgment debtor able to access and use funds – Failure of judgment creditor to file stay application – Whether fatal – Whether there was evidence of equitable fraud – Whether funds could still be garnished under O. 92 r. 4 of Rules of Court 2012*

A judgment in favour of the judgment creditor ('JC') was given pursuant to an application under O. 14A of the Rules of Court 2012. It was adjudged that the judgment debtor ('JD') was liable to pay the JC a total sum of RM317,836,534.74 and costs on solicitors-client and full indemnity basis ('judgment') pursuant to financing facilities given by the JC to the JD. The JC subsequently filed a notice of application (encl. 1) for a garnishee order against six garnishees, who were different banks, to enforce the judgment. Pursuant to the garnishee order to show cause or garnishee *order nisi* obtained by the JC, the first garnishee, Maybank Islamic Berhad ('Maybank') confirmed that it held a sum of RM67,845.97 in the JD's account. The fifth garnishee, Ambank Islamic Berhad ('Ambank') confirmed that it held a sum of RM22,278.22 in the JD's account. The JC only proceeded with the garnishee proceedings against Maybank and Ambank. The Senior Assistant Registrar ('SAR') dismissed the notice of application, declining to make an order absolute against Maybank and Ambank that all the debts due or accruing due by Maybank and Ambank to the JD be attached to answer the

judgment. The JC then filed notices of appeal in encls. 31 and 32 to appeal to the judge in chambers against the SAR's decision in dismissing the notice of application and in refusing to make the order absolute. The court allowed encls. 31 and 32 and made order absolute against Maybank and Ambank. Maybank and Ambank filed affidavits in explaining the status of the funds in the JD's accounts in Maybank and Ambank, which also showed a withdrawal of RM206,540 from the JD's account with Ambank and deposited into a Maybank account held by a company, Koiman Sdn Bhd ('KSB's Maybank account') and a total amount of RM143,170 taken from JD's accounts with Maybank and deposited into KSB's Maybank account (the withdrawal and transfers referred to as 'impugned transfers' and the amounts transferred in relation thereof as 'transferred amounts'). The court then made certain orders regarding the amounts to be garnished but no order was made in respect of the transferred amounts. The JC was dissatisfied with the decision of the court in not allowing or refusing to order that the transferred amounts be transferred or remitted back to the JD's bank accounts with Maybank and Ambank respectively from KSB's Maybank account for the same to be garnished by the JC. By way of the JC's affidavit in encl. 75, the JC prayed for the court's direction for the JC to garnish against Maybank and Ambank in respect of two appeals respectively in encls. 31 and 32: (i) the balance of the monies in the JD's accounts with the garnishees; and (ii) the transferred amounts 'siphoned' by the JD into KSB through the impugned transfers. The JC contended, primarily, that the JC was entitled to garnish the monies that had been taken out by the JD into the account of KSB, its fully-owned private company which the JD controlled and the impugned transfers was an act of the JD 'siphoning' out the monies into KSB to avoid liability and allow the monies to be garnished by the JC which amounted to an equitable fraud. The JC sought the court to order the JD to transfer the monies that it had 'siphoned' into KSB's Maybank account back to its respective accounts with Maybank and Ambank in order to enable the JC to garnish the same ('retransfer order'). The JD opposed the JC's application on the basis that the JC had no legal basis to pray for the retransfer order pursuant to the court's inherent powers under O. 92 r. 4 of the ROC.

Held (dismissing JC's application):

(1) When the SAR declined to grant the order absolute, it meant that the court had lifted the freezing order previously obtained through the granting of the *order nisi* and the garnishees, Maybank and Ambank, were no longer required to hold the JD's funds in the respective bank accounts. The JD would be able to access and use any funds being held as a result of the earlier *order nisi*. When the transferred amounts were first transferred, the JC did not file a stay application, the general position was that the JD was entitled to regard that the impugned

transfers were within the JD's rights as accorded by the law and the court had no power to prevent further transfers of the monies in the JD's accounts without a stay of the decision. (para 24)

(2) Under O. 49 of the ROC, specifically under r. 1(1), upon the necessary conditions being satisfied, the court may order the garnishee to pay the JC, from the amount garnished, the amount of any debt due or accruing due to the JD from the garnishee. Ultimately, that is what the court is empowered to do in garnishee proceedings *ie*, to make the order absolute. In the meantime, the debt is attached while the court considers whether to make such an order, as provided under r. 1(2) *ie,* pursuant to which the court makes an *order nisi.* In the context of bank accounts of the JD, the monies are frozen in the meantime and access of the JD to them is restricted. Once the court declines to grant the order absolute, the monies in the accounts are unfrozen and the JD would be able to access and use the funds. There is nothing in O. 49 or in any written law which states that the JD, in any circumstances, is not allowed to access and use the funds and in what manner. (para 29)

(3) The JC here was imploring upon the court to grant a relief, by making the retransfer order, to do something which was not provided by the Legislature. Given that the Legislature has not provided for such a relief to be granted, the court will be circumspect in using its inherent power to prevent the injustice and abuse of process as the JC so claimed. The backdrop of the episode of the impugned transfers was that the JC, after the SAR's decision declining to make an order absolute against Maybank and Ambank, did not apply or request for any stay of proceedings in any form. The JC was aware that once the court declined to grant the order absolute, the freezing order on the monies in the JD's accounts was lifted and the JD would be able to access and use any funds that were being held as a result of the earlier *order nisi.* This failure to apply for a stay of proceedings, which would have been considered by the court and would be allowed if there were special circumstances, was an oversight by the JC. The law provides for this relief (the stay pending appeal) and the JD had failed to avail itself of it. The JC's application for the retransfer order under the inherent powers of the court was also a form of abuse because the JC itself had omitted to apply for the stay and only after it was discovered that the funds that subsequently flowed into the JD's account had been taken out that it applied for the retransfer order to rectify this omission. Under these circumstances, this court could not exercise its inherent power to make the retransfer order as prayed for by the JC. (paras 30-32)

(4) There was no evidence to support the JC's contention of equitable fraud, particularly with regard to whether a relationship of trust or confidence existed between the parties. Further, whether equitable fraud was

committed by the JD was a highly contentious matter which was more suited for a trial involving cross-examination of witnesses. This court could not, based on the affidavit evidence, make a finding that there was equitable fraud committed by the JD when the JD transferred the transferred amounts from its accounts with Maybank and Ambank to KSB in an attempt to avoid liability and garnishment of the monies by the JC. The JC's contention on equitable fraud remained a conjecture. (para 39)

(5) The retransfer order as prayed by the JC in encl. 75 could not be made by the court in the exercise of its inherent powers under O. 92 r. 4 of the ROC to grant the relief to prevent injustice and abuse of process. The JC was also not entitled to the retransfer order as just and proper reliefs that were prayed for in encl. 1. (para 46)

Case(s) referred to:

Domnic Selvam S Gnanapragasam v. Kerajaan Malaysia & Ors [2006] 8 CLJ 114 HC ***(refd)***

Holmes v. Millage [1893] 1 QB 551 ***(refd)***

J & C New Poly Catering Sdn Bhd v. TTMP Bakun Consortium Sdn Bhd [2005] 4 CLJ 838 HC ***(refd)***

Jones v. Lipman [1962] 1 All ER 442 ***(refd)***

KTL Sdn Bhd & Anor v. Leong Oow Lai & Other Cases [2014] 1 LNS 427 HC ***(refd)***

Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application [1994] 1 LNS 279 HC ***(refd)***

Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***

NZ New Image Sdn Bhd v. Loh Yok Liang [2016] 9 CLJ 474 CA ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 14A, O. 49 r. 1(1), (2), O. 92 r. 4

For the judgment creditor/plaintiff - Abdul Rashid Ismail & Soong Weiwern; M/s Rashid Zulkifli

For the judgment debtor/defendant - Muhammad Danish Abdul Rasid; M/s Amar Izzat & Co

For the 1st garnishee - Sudarshini Maniam; M/s Hisham Yoong – KC Lim

For the 5th garnishee - Siti Nuradilah Mohd Radzi; M/s Azhar & Wong

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JUDGMENT

Atan Mustaffa J:

Introduction

[1] The judgment creditor in these garnishee proceedings, Bank Kerjasama Rakyat (M) Berhad, ("the JC") was successful in appeals to the judge in chambers against the decision of the Senior Assistant Registrar (SAR) to decline granting an order absolute against the garnishee banks in question.

Before the decision of the judge in chambers, the funds in the bank accounts which were previously attached by the *order nisi* were taken out by the judgment debtor, Koperasi Serbaguna Iman Malaysia Berhad ("the JD"). A

[2] The JC then applied to the court to garnish the funds taken out by the JD. The main issue before the court is whether these funds can still be garnished under O. 92 r. 4 of the Rules of Court 2012 ("ROC 2012"). B

Background Facts

[3] On 6 January 2020 a judgment in favour of the JC was given pursuant to an application under O. 14A of the ROC 2012 by this court in Kuala Lumpur High Court Civil Suit No. WA-22M-127-03-2019. It was adjudged that the JD was liable to pay the JC a total sum of RM317,836,534.74 as at 28 February 2019 and costs on solicitors-client and full indemnity basis ("the judgment") pursuant to financing facilities given by the JC to the JD. C

[4] On 14 February 2020, the JC filed a notice of application (encl. 1) for a garnishee order against six garnishees, who are six different banks, to enforce the judgment. Pursuant to the garnishee order to show cause or garnishee *order nisi* obtained by the JC on 9 June 2020, the first garnishee, Maybank Islamic Berhad ("Maybank"), confirmed that it held a sum of RM67,845.97 as at 26 June 2020 in the JD's account no. 562405612785 with Maybank. The fifth garnishee, Ambank Islamic Berhad ("Ambank"), confirmed that it held a sum of RM22,278.22 as at 2 July 2020 in the JD's account no. 0662021001624 with Ambank. The JC only proceeded with the garnishee proceedings against Maybank and Ambank. D E

[5] On 28 September 2020, the learned Senior Assistant Registrar (SAR) dismissed the notice of application, declining to make an order absolute against Maybank and Ambank that all the debts due or accruing due by Maybank and Ambank to the JD be attached to answer the judgment ("the learned SAR's decision"). F

[6] On 9 October 2020, the JC filed notices of appeal in encls. 31 and 32 to appeal to the judge in chambers against the learned SAR's decision on 28 September 2020 in dismissing the notice of application dated 14 February 2020 and in refusing to make the order absolute. G

[7] On 2 February 2021, after hearing the submissions from the parties on the merits of encls. 31 and 32, the court allowed both encls. 31 and 32 and made order absolute against Maybank and Ambank. H

[8] Post order absolute, the court directed the JD, Maybank and Ambank to provide information by way of affidavits about the flow of funds in account no. 562405612785 with Maybank and account no. 0662021001624 with Ambank, as well as to explain the status of funds in other accounts in order to assist the court in determining the amount that should be garnished by the JC. Maybank and Ambank filed affidavits in explaining the status of the funds in the JD's accounts in Maybank and Ambank. I

[9] The statements of account exhibited in Maybank and Ambank's affidavits show:

(i) the total balances in accounts no. 562807523162, 564397117057, 562405612792, 562405612785, 562405601703, 562405601698 and 562405506087 with Maybank as at 2 April 2021 amount to RM56,859.62; and

(ii) the total of the balances in accounts no. 12021002264 and 662021001624 with Ambank as at 2 April 2021 amount to RM1,233.50.

[10] The statements of account exhibited in Maybank and Ambank's affidavits also show:

(i) a withdrawal of RM206,540 from the JD's account no. 662021001624 with Ambank on 9 November 2020 and deposited into Maybank Account No. 562405606683 ("KSB's Maybank Account") held by a company called Koiman Sdn. Bhd. ("KSB"); and

(ii) a total amount of RM143,170 taken out from the JD's accounts no. 564397117057, 562807523162, 562405612792, 562405601703 and 562405506087 with Maybank on 20 October 2020 and deposited into KSB's Maybank Account.

(The withdrawal and transfers described in (i) and (ii) above will be referred to as the "impugned transfers" and the amounts transferred in relation thereof as "the transferred amounts").

[11] On 8 June 2021, the JC and JD were directed to file submissions for the court to order the amount to be garnished by the JC, post order absolute. This is by way of determining whether the JC is entitled to garnish monies in the respective accounts of the JD with Maybank and Ambank and the transferred amounts that were transferred out post order absolute given *via* encl. 31 and encl. 32.

[12] On 17 August 2021, the court made the following orders:

(i) for encl. 31, the amount to be garnished is RM56,859.62 which is the total of the balances in accounts no. 562807523162, 564397117057, 562405612792, 562405612785, 562405601703, 562405601698 and 562405506087 with Maybank; and

(ii) for encl. 32, the amount to be garnished is RM1,233.50 which is the total of the balances in accounts no. 12021002264 and 662021001624 with the fifth garnishee.

[13] No order is made in respect of the transferred amounts.

[14] The JC is dissatisfied with the decision of the court in not allowing or refusing to order that the transferred amounts be transferred or remitted back to the JD's bank accounts with Maybank and Ambank respectively from KSB's Maybank Account for the same to be garnished by the JC. The JC filed notices of appeal to the Court of Appeal against the court's decision on 17 August 2021 in two separate appeals.

The JC And JD's Cases

[15] By way of the JC's affidavit affirmed on 4 May 2021 in encl. 75, the JC prayed for the court's direction for the JC to garnish against Maybank and Ambank in respect of the two appeals respectively in encls. 31 and 32:

(i) The balance of monies in the JD's accounts with the garnishees; and

(ii) The transferred amounts "siphoned" by the JD into KSB through the impugned transfers.

[16] There is no dispute on the garnishing of the balance of monies in the JD's accounts with the Maybank and Ambank in the first part of the JC's prayer but the JD opposes the garnishing of the transferred amounts that were the subject of the impugned transfers.

[17] The impugned transfers occurred on 20 October 2020 and 9 November 2020, after the learned SAR's decision on 28 September 2020 but before the order absolute made by the judge-in-chambers on appeal on 2 February 2021. Notwithstanding, the JC contended that the court can use its inherent powers under O. 92 r. 4 of ROC 2012 to grant the relief to prevent injustice and abuse of process and the relief sought by the JC are just and proper reliefs which ought to be granted by the court as the JC has prayed for other reliefs that the court thinks just in the notice of application (encl. 1).

[18] The JC contended primarily that the JC is entitled to garnish the monies that have been taken out by the JD into the account of KSB, its fully owned private company which the JD controls and the impugned transfers is an act of the JD "siphoning" out the monies into KSB to avoid liability and allow the monies to be garnished by the JC which amounts to an equitable fraud.

[19] Although in encl. 75 the JC prayed for the garnishing of the transferred amounts, subsequently in the JC's written submissions in reply, the JC explained that it is actually seeking the court to order the JD to transfer the monies that it has "siphoned" into KSB's Maybank account back to its respective accounts with Maybank and Ambank in order to enable the JC to garnish the same. For convenience, I shall refer to this relief sought by the JC as "the retransfer order".

[20] The JD opposes the JC's application on the basis that the JC has no legal basis for praying for the retransfer order pursuant to the court's inherent powers under O. 92 r. 4 ROC 2012. The JD contended that the allegations and assumptions about the equitable fraud relating to the impugned transfers as alleged by the JC are baseless and made without evidence. The JD also argued that the court cannot grant a relief in the nature of damages under its omnibus clause of "such further or other relief as the court deems just and proper" as the JC originally did not intend to garnish the funds with KSB in the notice of application.

Analysis And Findings Of The Court

The Effect Of The Granting Of The Order Absolute Being Declined By The Learned SAR

[21] The starting point of the court's analysis is a consideration of the immediate effect of the learned SAR's decision on 28 September 2020. To recap, the learned SAR dismissed the JC's notice of application in encl. 1, declining to make an order absolute against Maybank and Ambank. It is not disputed that upon the learned SAR's decision being made, no stay of proceedings was applied or requested for by the JC in any form. The notices of appeal in encls. 31 and 32 were only filed by the JC on 9 October 2020.

[22] From the examination of the affidavits filed by Maybank and Ambank as directed by the court, it was revealed that:

(i) In respect of the JD's account with Ambank, a sum of RM206,540 was taken out from the account on 9 November 2020 by way of cheque and deposited into KSB's Maybank account; and

(ii) In respect of the JD's accounts with Maybank, the JD on 20 October 2020 made five transfers amounting to RM143,170 from five accounts held by the JD in Maybank into KSB's Maybank account.

[23] These were the impugned transfers earlier referred to and the amounts transferred earlier referred to as the transferred amounts. The impugned transfers were made after the notices of appeal were filed.

[24] These appeals did not operate as an automatic stay of the learned SAR's decision. When the learned SAR declined to grant the order absolute on 28 September 2020, it means that the court has lifted the freezing order previously obtained through the granting of the *order nisi* and the garnishees, Maybank and Ambank, are no longer required to hold the JD's funds in the respective bank accounts. The JD would be able to access and use any funds that were being held as a result of the earlier *order nisi*. As up until 20 October 2020 when the transferred amounts were first transferred, the JC did not file a stay application, the general position is that the JD was entitled to regard that the impugned transfers were within the JD's rights as accorded by the law and the court has no power to prevent further transfers of the monies in the JD's accounts without a stay of the decision.

[25] What is described above is the general position when the court declines to grant an order absolute. However, it appears that in praying for the retransfer order, the JC is going against this general position and relies on the following grounds to justify praying for the relief:

(i) The court can use its inherent powers under O. 92 r. 4 of ROC 2012 to grant the relief to prevent injustice and abuse of process;

(ii) The JC is entitled to just and proper reliefs that are prayed for in the JC's notice of application for the garnishee order (encl. 1); and

(iii) There was a lack of *bona fide* and probity in the conduct of the JD in these garnishee proceedings.

Inherent Powers Of The Court

[26] The JC's position is that the retransfer order can be given in order for the JC to garnish the transferred amounts after they are remitted to the JD's bank accounts pursuant to the court's inherent powers under O. 92 r. 4 of the ROC 2012 as it is necessary to prevent injustice and abuse of process.

[27] The JC cites the cases of *Domnic Selvam S Gnanapragasam v. Kerajaan Malaysia & Ors* [2006] 8 CLJ 114; [2007] 2 MLJ 761 (High Court), *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors And Another Application* [1994] 1 LNS 279; [1994] 2 MLJ 789 (High Court), *J & C New Poly Catering Sdn Bhd v. TTMP Bakun Consortium Sdn Bhd* [2005] 4 CLJ 838; [2006] 1 MLJ 587 (High Court) and *Holmes v. Millage* [1893] 1 QB 551 (English Court of Appeal) where the inherent powers of the court have been invoked in a variety of circumstances to argue that the court has the jurisdiction and power to make the retransfer order.

[28] I do not agree with the JC's position.

[29] First, I reconsidered the scope of O. 49 ROC 2012 which governs garnishee proceedings. It is clear that under O. 49, specifically under r. 1(1), upon the necessary conditions being satisfied, the court may order the garnishee to pay, from the amount that is garnished, the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee. Ultimately, that is what the court is empowered to do in garnishee proceedings under O. 49 *ie*, to make the order absolute. In the meantime, the debt is attached while the court considers whether to make such an order, as provided under r. 1(2) *ie*, pursuant to which the court makes an *order nisi*. In the context of bank accounts of the judgment debtor, the monies are frozen in the meantime and access of the judgment debtor to them is restricted. As explained earlier, once the court declines to grant the order absolute the monies in the accounts are unfrozen and the judgment debtor would be able to access and use the funds. There is nothing in O. 49 or in any written law which states that the judgment debtor, in any circumstances, is not allowed to access and use the funds and in what manner.

[30] The JC here is imploring upon the court to grant a relief, by making the retransfer order, to do something which is not provided by Legislature. Given that Legislature has not provided for such a relief to be granted, the court will be circumspect in using its inherent power the prevent injustice and abuse of process as the JC so claims. In *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145, the Federal Court (per Wan Yahya FCJ) observed as follows:

> Inherent powers as contained in O. 92 r. 4 are indispensable implements for use of the courts to prevent injustice or any abuse of the process of the Court. But the powers themselves stand to be abused if they were to be exercised without circumspection by the courts. The Court would undoubtedly use them in cases where Parliament had omitted to provide in the Act something so glaring which obviously ought to have been there. But on no account should these powers be used to defeat the intention of the legislature, especially so when it had deliberately excluded the use of such particular remedy from any legislation (see p. 219G-H); *Duport Steels Ltd & Ors v. Sirs & Ors* [1980] 1 WLR 142 followed."

[31] It is with this great circumspection that I considered whether I could exercise the inherent jurisdiction of the court in making the retransfer order sought by the JC.

[32] I accept that the court's inherent power under O. 92 r. 4 ROC 2012 is only available if there is no law which provides for the relief that is prayed for. This was stated in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* (*supra*). However, the backdrop of the episode of the impugned transfers is that the JC, after the learned SAR's decision on 28 September 2020 declining to make an order absolute against Maybank and Ambank, did not apply or request for any stay of proceedings in any form. The JC was aware that once the court declined to grant the order absolute, the freezing order on the monies in the JD's accounts was lifted and the JD would be able to access and use any funds that were being held as a result of the earlier *order nisi*. I view this failure to apply for a stay of proceedings, which would have been considered by the court and would be allowed if there were special circumstances, as an oversight by the JC. The law provides for this relief (the stay pending appeal) and the JC has failed to avail itself of it. The JC's attempt to invoke the court's inherent powers to make the retransfer order is akin to shutting the stable door after the horse has bolted. I also view that, the JC's application for the retransfer order under the inherent power of the court is a form of abuse. This is because, the JC itself has omitted to apply for the stay and only after it is discovered that the funds that subsequently flowed into the JD's account have been taken out that it applied for the retransfer order to rectify this omission. Under these circumstances, the court cannot exercise its inherent power to make the retransfer order as prayed by the JC.

The JC's Prayers Being Just And Proper Reliefs

[33] The JC's position is that the prayers for the retransfer order sought by the JC are just and proper reliefs ought to be granted by the court as in para. 4 of the notice of application (encl. 1), the JC prays for other reliefs that the court thinks just. The JC submitted that the retransfer order sought by the JC in encl. 75 are the just and proper reliefs encapsulated in the said para. 4 of the notice of application.

[34] The basis of the JC's prayers is that the JC is entitled to garnish the monies that have been "siphoned" out by the JD into the account of KSB, its fully owned private company which the JD controls, because the monies has always been the subject matter of the garnishee proceedings herein. In this regard, the JC submitted as follows:

(i) The act of JD in "siphoning" out the monies into KSB is not a *bona fide* transaction, but rather an attempt to avoid liability and allow the monies to be garnished by JC which amounts to an equitable fraud, causing injustice to the JC; and

(ii) Given the equitable fraud, the court can lift the corporate veil to make the retransfer order.

[35] Even assuming that the court can make the retransfer order as just and proper reliefs prayed for in the notice of application, the court is required to make a finding of fact on whether such an equitable fraud as alleged by the JC has occurred. The evidence that is before the court on this is summarised as follows:

(i) In encls. 64 and 70 Maybank has exhibited the JD's statements of account which show that the sum of RM206,540 was taken out from the JD's account by way of a cheque and deposited in to KSB's Maybank account;

(ii) In encls. 66 and 67, Ambank has exhibited the JD's statements of account for the JD's five accounts which show that a total sum of RM143,170 was transferred from these accounts into KSB's Maybank account; and

(iii) The Companies Commission of Malaysia's search on KSB shows that KSB is a private company fully owned by the JD and the Board of Directors of KSB also consists of the members of the JD's Co-Operative Board.

[36] While the evidence above is uncontroverted, it is still a big leap from saying that the transferred amounts were transferred by the JD to its own subsidiary to a finding of fact that this was an attempt by the JD to avoid liability and allow the monies to be garnished by JC which amounts to an equitable fraud.

[37] The JC has referred the court to the case of *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355 (Court of Appeal) which cited the case of *Jones v. Lipman* [1962] 1 All ER 442 in support of the proposition that there is equitable fraud where a separate entity is used as a "device and a sham, a mask" in order to "avoid recognition by the eye of equity". However, the JC must first satisfy the court that such an equitable fraud has occurred.

[38] In *KTL Sdn Bhd & Anor v. Leong Oow Lai & Other Cases* [2014] 1 LNS 427; [2014] MLJU 1405 (High Court) Wong Kian Kheong JC (as he then was) explained what elements need to be present in an action for equitable fraud:

> It is clear from *Takako Sakao (No 1)*, at p. 411, that equitable fraud can be proven by the following without a need to prove intention to deceive (which is necessary to prove Common Law fraud):
>
> (a) there is a relationship of trust or confidence between the parties. Such a relationship may be inferred from the circumstances of the case in question; and
>
> (b) there is unconscionable conduct by the defendant in question.

[39] There is no evidence produced by the JC to support the JC's contention of equitable fraud, particularly with regard to whether a relationship of trust or confidence exists between the parties. Further, whether equitable fraud was committed by the JD is a highly contentious matter which is more suited for a trial involving cross-examination of witnesses. In the *KTL Sdn Bhd* case, the court found equitable fraud for the plaintiff only after a full trial. The court cannot, based on the affidavit evidence, make a finding that there is equitable fraud committed by the JD when the JD transferred the transferred amounts from its accounts with Maybank and Ambank to KSB in an attempt to avoid liability and garnishment of the monies by the JC. The JC's contention on equitable fraud remains a conjecture.

[40] The court also considered that if the retransfer order is made, since the transferred amounts are with KSB, this will involve an order that is directed to the JD, for the JD to direct KSB to transfer or remit the transferred amounts to the JD's respective bank accounts. The nature of a garnishee order (in the case of monies in bank accounts) is for monies held by a bank to be injuncted from being paid to the customer and upon the necessary conditions being satisfied, the court may order the bank as the garnishee to pay, from the amount that is garnished, the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee. An order for the judgment debtor to direct its subsidiaries to transfer monies back to the judgment debtor is well beyond the scope and nature of a

garnishee order. The judgment creditor could not have contemplated this scenario when praying for just and proper reliefs in encl. 1. The facts surrounding the transferred amounts only existed after Maybank and Ambank filed their affidavits when directed by the court.

[41] In *NZ New Image Sdn Bhd v. Loh Yok Liang* [2016] 9 CLJ 474; [2016] MLJU 1768 (Court of Appeal) it was held that the court cannot entertain a relief under its omnibus clause of "such further or other relief as the court deems just and proper" when it falls outside the scope of the substantive relief prayed for originally. Similarly, in the instant case the court cannot entertain a relief for the retransfer order based on equitable fraud under the JC's omnibus clause in para. 4 of encl. 1.

[42] Further, although the JC contended that the JD has full control over KSB by virtue of the JD owning 100% of the shares of KSB and controls the same through the same members of JD's Co-operative Board having the same Board of Directors in KSB, that is all we know. There is no evidence of how the control can be exercised through the internal procedures of the JD and KSB. Thus, if the JD is ordered to direct KSB to transfer back the transferred amounts there must be a certainty that the JD is entitled to give this direction as of right and that KSB will be able to comply with this direction.

[43] There is also a possibility that the transferred amount with KSB is already utilised and may no longer be capable of being transferred back to the JD. KSB is not subject to any order restraining it from using the monies. If the court orders the JD to direct KSB to transfer back the transferred amounts to the accounts of the JD, the transferred amounts may not come back to the JD's accounts and such an order from the court will be rendered meaningless and possibly be oppressive to the JD's officers who may be subject to contempt proceedings if the transferred amounts are not returned.

Lack Of Good Faith And Probity

[44] The JC contended that the JD's actions show a lack of good faith and probity in the garnishee proceedings as the JD was attempting to hide the fact that the JD had siphoned out the monies in its accounts in Maybank and Ambank into the account of KSB by not complying with a direction of the court given on 2 March 2021 for the JD to file an affidavit to provide information about the flow of funds in the accounts in Maybank and Ambank as well as to explain the status of funds in other accounts, in order to assist the court in determining the amount that should be garnished by the JC. The JD then filed notice of appeal to the Court Appeal on 16 March 2021 against this direction and filed a notice of application for a stay of garnishee proceedings pending disposal of their notice of appeal to the Court of Appeal against the 2 March 2021 direction, which the JD regarded as an appealable decision of the court. The JC submitted that the court should consider this lack of *bona fide* and improbity in determining whether to make the retransfer order.

[45] I find this submission to be irrelevant given my findings that on a substantive level that the court cannot exercise its inherent powers under O. 92 r. 4 or grant just and proper reliefs under the JC's omnibus clause in para. 4 of encl. 1 for the retransfer order prayed for by the JC in encl. 75.

Conclusion

[46] Premised on the affidavits filed by the JC, JD, Maybank and Ambank and submissions filed, I conclude that the retransfer order as prayed by the JC in encl. 75 cannot be made by the court in the exercise of its inherent powers under O. 92 r. 4 of ROC 2012 to grant the relief to prevent injustice and abuse of process. The JC is also not entitled to the retransfer order as just and proper reliefs that are prayed for in encl. 1.

[47] Accordingly, I dismissed the JC's application and ordered costs of RM5,000 for each of encls. 31 and 32 to be paid by the JD to the JC. I also ordered costs of RM600 for Ambank in respect of encl. 32 which is to be deducted from JD's account with Ambank.